No. 14784

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MATT STANOVICH,

Plaintiff-Appellant,

vs.

ANTE JURLIN, *et al.,*

Defendants-Appellees.

APPELLEES' BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

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Jurisdictional Statement.

This is an appeal from a portion of a final judgment of the United States District Court for the Southern District of California, Honorable James M. Carter, in a civil action brought by a fisherman plaintiff on account of personal injuries sustained on board a fishing vessel. The first two causes of action in the complaint are not involved in this appeal. They were tried before a jury on theories of negligence under the Jones Act and unseaworthiness under the General Maritime Law. The third cause of action, which is involved in this appeal, was for maintenance and cure only.

The answer to the complaint challenged the court's jurisdiction over the third cause of action. The third

cause of action was heard and decided by the court below, sitting without a jury. No formal Order transferring the third cause of action to the admiralty side of the court was made, and we cannot agree with the appellant's jurisdictional statement that the third cause of action was actually heard by the court sitting in admiralty. We believe a more accurate statement is that the third cause of action was heard as a civil cause by the court sitting without a jury, and that so far as jurisdiction can be conferred by consent the parties, through their counsel, consented and agreed that the procedure suggested in the case of *Jordine v. Walling,* 185 F. 2d 662, should be followed.

We do not believe that this court has ruled upon the specific problems of jurisdiction which are posed by *Jordine v. Walling, supra,* and the contrary decision of the First Circuit in the case of *Doucette v. Vincent,* 194 F. 2d 834. In view of the unsettled state of the law on this point in this circuit we do not concede the point of jurisdiction. If the court below had jurisdiction of the third cause of action under 28 United States Code, Section 1333, it would follow that this court now has jurisdiction of the appeal. Jurisdictional facts were not alleged in the complaint to bring the third cause of action under either 28 United States Code, Section 1331, or 28 United States Code, Section 1332. We do not propose to further press the point of jurisdiction in this brief beyond directing the court's attention to the procedure which was followed below for review and approval or disapproval.

Statement of the Case.

The plaintiff was injured in a fish boat accident on November 12, 1953. He was received as a patient by the United States Public Health Service at San Pedro, California, on the same date as an ambulatory patient. He was found to be suffering from a bruise in the right groin. Note was made that he had an artificial left leg. No bone damage was found. Various calcifications involving the prostate and low back area were noted. Active out-patient treatment was commenced [Rep. Tr. 111-112]. By December 8, 1953, substantial improvement was noted. Continuing improvement was noted on December 29, 1953, and on January 12, 1954 [Rep. Tr. 113]. On January 26, 1954, the record notes that the patient is better but will probably not be able to resume long fishing trips; that appellant is handicapped by an artificial leg; and does not believe that he has recovered completely in a three-month period, which is ordinarily sufficient for such injuries. The examining physician, Dr. Halber, concurred with appellant in the opinion that the appellant would not be able to do fishing work [Rep. Tr. 114]. The appellant was continued on the unfit-for-duty list for an additional month, and finally was discharged on February 26, 1954, with the notation: "Maximum hospital benefits. Discharged. Diagnosis: Contusion of muscles." Certificate of discharge was subsequently issued on March 1, 1954, with the notation that appellant was permanently unfit for sea duty [Rep. Tr. 114, line 20 and following].

Appellant received active out-patient treatment for a period of 106 days. After discharge by the United States Public Health Service doctors appellant was referred by his attorney to Dr. Seymour Albans, orthopedic specialist

of Long Beach, California, who first saw appellant on March 8, 1954. Dr. Albans was unable to see any bruise or any result of injury by a careful examination of appellant, nor did he see any evidence of injury in the X-rays, except a disease evidenced by calcium deposits [Rep. Tr. 51, line 3 *et seq.*]. Dr. Albans did find a condition of enlargement of the lymph glands in the vicinity of the right groin which he thought would clear up spontaneously and which was not a matter to be concerned about, and so told appellant. Dr. Albans was advised by appellant of pain over the tail bone. On this point Dr. Albans testified [Rep. Tr. 23, line 16 *et seq.*]:

> "Pain in this area, pain over the coccyx, is a very frequent complaint. We see many patients referred to us who have this complaint, and it is a problem always, because usually once this area is complained of, pain lasts a long time. And unfortunately there are many things we can do to help, but there is no certain cure. And I told Mr. Stanovich that I thought we could do things for him that might help. If it didn't, we would discontinue our treatment."

Dr. Albans proceeded to treat the appellant, using various types and kinds of treatment, some of which treatment appeared to him to be beneficial and some of which appeared to aggravate the condition [Rep. Tr. 27]. Treatment was finally discontinued on August 17, 1954, at which time, according to the doctor, the appellant stated to the doctor that he, the appellant, considered that he was 80 per cent improved [Rep. Tr. 27, line 24] . . . "and when we stopped our therapy, in his words he was 80 per cent improved, he felt."

The appellant had not been rehabilitated as a fisherman and remained unable to return to his duties as a fisherman [Rep. Tr. 32, line 5 *et seq.*].

From the above brief statement of the case it appears that this appeal is concerned with the sole proposition as to whether the findings of the District Court, based upon conflicting evidence as to when appellees' liability for maintenance and cure should terminate, should be reversed by this court. On the basis of all of the evidence before it, which included United States Public Health Service records, the testimony of the appellant and members of his family including his wife and his niece, and the testimony of Dr. Albans, the trial court found that the appellant had obtained maximum benefits on March 1, 1954, and that subsequent treatments were palliative in nature.

Summary of Argument.

The findings of the trial court were based upon conflicting evidence. The trial court was not bound to accept the appellant's evidence, even assuming that it was not directly contradicted in all respects. Under familiar and well-settled rules, findings of the trial court under the circumstances here existing are presumptively correct and are not to be rejected and reversed.

Argument.

In an appeal in admiralty where all, or substantially all, of the evidence is heard by the trial judge, and the question is one of credibility of witnesses on conflicting testimony, the presumption that the findings by the District Court are correct has very great weight.

Tawada v. United States (C. C. A. 9), 1947 A. M. C. 947, 162 F. 2d 615;

Benedict on Admiralty, 6th Ed., Vol. IV, Sec. 573, and cases cited.

Tawada v. United States, supra, appears very close to the present case on its facts. In the *Tawada* case all the evidence, except the United States Public Health Service medical records, was heard by the trial judge. There was a conflict between the libelant's testimony and the Public Health records, particularly as to the libelant's knowledge of facts bearing on his physical condition. This court pointed out that the trial court had evidently rejected the libelant's testimony in certain respects and that the trial court was justified in finding against the libelant on the issue raised.

A similar situation is presented in the case herein. The Public Health records indicate that appellant had attained maximum improvement on February 26, 1954, and formalized its finding by issuing its certificate of discharge on March 1, 1954. The appellant contends to the contrary, and alleges that he continued to receive improvement thereafter. A conflict in the evidence was accordingly created. The findings of the Public Health doctors were opposed to the opinion of the appellant himself. The trial court proceeded to resolve this conflict against the appellant and, as in the *Tawada* case, evidently re-

jected certain portions of the appellant's evidence. The trial court saw and heard the appellant, as well as the appellant's wife, the appellant's niece, and the appellant's doctor to whom appellant had been referred by his attorney. The trial court was in an excellent position to determine what weight to give to all of the testimony before it. As we see it, the appellant's quarrel with the trial court's decision is based entirely upon the proposition that the trial court did not accept the appellant's evidence at the same value which the appellant himself placed upon it. The trial court was not required to accept the appellant's testimony, or that of his doctor, even if such testimony was uncontradicted.

Uncontradicted evidence is not necessarily conclusive in any event.

Elzig v. Gudwangen (C. C. A. 8), 91 F. 2d 434.

This proposition is especially true when directed to evidence which is not susceptible of contradiction, such as the appellant's own opinion or statement as to how he felt. The trial court, in weighing such evidence, is required to look behind the spoken word and consider the interests and biases which may influence it. The trial court was dealing with a purely subjective proposition in attempting to decide how the appellant felt at any particular time, and would be obliged to consider the extent to which the appellant may have exaggerated as well as the extent to which the appellant was trying to build up a case of general and special damages for his civil jury causes of action. The record shows that the appellant was definitely claims conscious. Color photographs were taken of the inside area of the appellant's right thigh within two weeks after the accident and used in the lawsuit [Rep. Tr. 6, *et seq.*, Pltf. Ex. 1]. Normally such pictures are

not taken for purely esthetic purposes, or to be included in the family album. It is apparent that the appellant was considering the possible advantages of a lawsuit quite soon after his accident. The appellant and his family live in San Pedro and had been treated for years by Dr. Dunbar of San Pedro. Dr. Dunbar was never consulted concerning the appellant's condition [Rep. Tr. 66-67]. If it were entirely true that the appellant was suffering such extreme pain during the 106 days of treatment by the Public Health doctors and at the time of his eventual discharge and thereafter, it seems a somewhat strange and inconsistent circumstance that he would not at least talk to Dr. Dunbar about his problem.

As against the appellant's testimony as to how he felt at various times the court was obliged to consider the fact that he had been treated for a period of 106 days by Public Health Service doctors—a period in excess of that normally required in such cases; that the Public Health Service doctors had discharged appellant as having received maximum benefits and that when appellant's new doctor saw appellant a few days later he was unable to find anything objectively wrong. Certainly when all of these factors are considered we cannot understand the contention that the trial court's findings are clearly wrong. To the contrary, we submit that the trial court decided the question on the basis of conflicting evidence and in accordance with the preponderance of all of the evidence which the trial court believed true.

The question of maximum benefits and when liability for maintenance and cure ends is a question of fact.

Tawada v. United States, supra;

Brett v. Carras (C. C. A. 3), 203 F. 2d 451.

It is also a question of fact which is based in part upon opinion. On the one hand we have the opinion of the Public Health doctors, based upon their observations of the appellant as well as upon their general knowledge and experience, and their treatment of similar cases. There would be no reason for the Public Health doctors to deprive the appellant of further reasonable necessary medical care or treatment. No financial considerations or collateral questions of advantage in litigation would be apt to bias their judgment. The Public Health Service facilities are entirely adequate for the treatment of such cases and include physiotherapy equipment and the services of orthopedic consultants [Rep. Tr. 56-57].

On the other hand we have evidence concerning the appellant's statement to Dr. Albans that he felt 80 per cent improved after seeing Dr. Albans. The testimony concerning the 80 per cent improvement was clearly and entirely based upon the appellant's own evaluation and opinion, and not upon the evaluation and opinion of Dr. Albans [Rep. Tr. 27, line 25, and repeated at Rep. Tr. 28-29]. We know that the trial court evaluated all of these matters because they were specifically mentioned in oral argument before the trial court on the submission of the third cause of action. Other courts have held that the findings of a trial court on opinion evidence is especially persuasive.

See:

"The Advance," 1930 A. M. C. 1555, 43 F. 2d 824.

The date when liability for maintenance and cure ends is purely a question of fact. Courts ordinarily use the date of discharge from the Marine Hospital when determining the end of the period of maintenance and cure.

Norris, Law of Seamen, Vol. II, page 179.

In some instances maintenance has extended beyond the date of discharge by the Public Health Service doctors, particularly if the seaman is looking for work and finds employment within a reasonable length of time. Such is not the case here, as the Public Health Service doctors as well as appellant's doctor concurred in the opinion that appellant was permanently unfit for sea duty.

As appellant was unfit for sea duty when discharged by the Public Health Service doctors and remained unfit for sea duty after treatment by his doctor, the trial court correctly described the treatment obtained by appellant after his discharge by the Public Health Service doctors as palliative in nature. It was not treatment designed to restore appellant to a fit-for-duty statute; at the very best it might help him to feel more comfortable. Even on this point appellant's doctor could give no positive assurance [Rep. Tr. 23].

We have re-examined all of the authorities cited by appellant in his brief. We have no quarrel with the propositions of law which are stated in those decisions. Each and every seaman's maintenance and cure case must be decided upon its own particular facts, within the framework of the general principles established in leading cases, such as *Farrell v. United States,* 306 U. S. 511, 93 L. Ed. 850, and this court's decision in *Luksich v. Misetich,* 140 F. 2d 812.

We believe this court's opinion in *Luksich v. Misetich* is of significance in this case. The appellant there contended, just as the appellant here contends, that maintenance should be paid as long as medical treatment was in any way beneficial to him, and for a greater period of time than was allowed by the District Court. The appellant had been allowed maintenance until the time he had

reached a maximum state of recovery as found by the District Court. Appellant was treated by the United States Public Health Service in San Pedro, California, and had not been discharged at the time of trial. The appellant moved this court for an order to take additional proof, to extend the maintenance period. This court said, page 814:

> "Other of the affidavits in support of libellant's motion (for order to take additional proof) refer to his complete recovery from his injury. The purpose to be achieved, obviously, is an extension of time for which maintenance and cure is awarded. However, there is no indication that full recovery resulted from continued and necessary medical treatment, an essential to enlarge the period during which libellant is entitled to compensation. Therefore, no good cause is shown for the taking of the testimony in question, and the motion is denied insofar as it relates to such evidence."

Applying the rule of *Luksich v. Misetich* to this case we find that even if the trial court had accepted all of the appellant's evidence at the full value appellant places upon it the appellant's proof would still have been insufficient. The appellant and his doctor contend that full recovery was not accomplished; that appellant remained unfit for duty, suffered continued pain, and might need an operation [Rep. Tr. 33-34].

We think this is a case where the appellant is attempting to recover damages for pain and suffering under the label of maintenance and cure. The words of the Supreme Court in *Farrell v. United States, supra,* 306 U. S. at 519, appear to be appropriate:

> "Maintenance and cure is not the only recourse of the injured seaman. In an appropriate case he may

> obtain indemnity or compensation for injury due to negligence or unseaworthiness and may recover, by trial before court and jury, damages for partial or total disability. But maintenance and cure is more certain if more limited in its benefits. It does not hold a ship to permanent liability for a pension, neither does it give a lump-sum payment to offset disability based on some conception of expectancy of life. Indeed the custom of providing maintenance and cure in kind and concurrently with its need has had the advantage of removing its benefits from danger of being wasted by the proverbial improvidence of its beneficiaries. The government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it."

In this case the appellant presented his claims for indemnity for negligence and unseaworthiness to a jury. The jury was fully advised as to the appellant's claims for permanent and partial disability, loss of wages, and pain and suffering, and rendered their verdict accordingly, and in appellant's favor, for $6,500.00. It must be presumed that the appellant was fully and fairly dealt with in so far as any pain and suffering was proved, either before or after March 1, 1954. We do not think it is sound law to undertake to upset the trial court's findings, fully and fairly arrived at, in order to extend liability for maintenance and cure to cover the nebulous type of situation here presented. Certainly it would be possible for any injured seaman, after being discharged by the Public Health Service or by any other medical facility, to shop around until he found a doctor who would undertake additional treatment which might prove beneficial both to the patient and to the doctor. We believe that it

is sound policy and sound law to require that an end be written to each incident at some reasonable time which is objectively determined. No more satisfactory method of resolving such incidents has been suggested to date than the method of a trial upon the facts and a finding thereon by the trial judge. We submit that an examination of the record in this case will establish that the appellant has received complete justice, and that no good reason exists for disturbing the result reached in the trial court.

Conclusion.

We accordingly submit that the judgment of the District Court on the third cause of action should be affirmed.

Respectfully submitted,

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Attorney for Defendants-Appellees.